PERWIRA HABIB BANK MALAYSIA BHD

v.

ASQUARE CREDIT & LEASING SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[SUIT NO: D4-23-2340-87]
28 JANUARY 2004

CIVIL PROCEDURE: *Striking out - Want of prosecution - Abuse of process - Plaintiff delayed for more than ten years in proceeding with action to set down matter for trial - Whether delay inordinate and inexcusable - Whether 5th defendant acquiesced to delay - Whether 5th defendant prejudiced - Rules of the High Court 1980, O. 18 r. 19(1)(d), O. 92 r. 4*

This was an application by the 5th defendant, under O. 18 r. 19(1)(d) read with O. 92 r. 4 of the Rules of the High Court 1980, to strike out the plaintiff's claim on the grounds of abuse of the process of the court and want of prosecution. The plaintiff, which had filed an action against all the defendants, had been ordered, pursuant to a summons for directions, to take all necessary actions for the setting down of the action for trial within 90 days from the date of the order. The plaintiff, however, only served the 5th defendant a copy of the notice to proceed with the action more than ten years later. The main issue of contention was whether the delay on the part of the plaintiff in taking the necessary action to set down the matter for trial was inordinate and inexcusable, and likely to cause the 5th defendant serious prejudice. The plaintiff argued the delay ought not to be considered by this court because the 5th defendant had, by conduct, induced the plaintiff to reasonably believe that the 5th defendant intended to exercise his right to trial, and consequently, had acquiesced to the plaintiff's delay.

Held:

[1] The plaintiff had failed to furnish the court with any satisfactory explanation or provide any reasonable excuse for the delay. (p 412 c)

[2] In respect of the plaintiff's contention of the 5th defendant's conduct, the 5th defendant was entitled to apply to strike out the plaintiff's action for want of prosecution at any stage of the proceedings. Furthermore, any delay should not be held against the 5th defendant and the mere fact that he had not filed his defence diligently did not, by itself, provide a ground for refusing to grant the 5th defendant's application to dismiss the action.

Although the 5th defendant could have taken the initiative to set down the action for trial, it was still open to the 5th defendant to apply to strike out the plaintiff's claim. (pp 413 h & 414 a)

[3] There was evidence emanating from the 5th defendant to the effect that after a lapse of so many years, all the material records that were previously in the possession of the 5th defendant had been lost or been destroyed. The 5th defendant deposed that he too would not be able to recall and give evidence at the trial in regard to all matters that had happened more than ten years ago. On the facts, if the plaintiff's action were to be allowed to continue, there would be a substantial risk that it would not be possible to have a fair trial for the 5th defendant and, consequently, it would cause serious prejudice to the 5th defendant. The 5th defendant had sufficiently proved that all the pre-conditions for striking out – *ie*, inordinate delay and prejudice to the defendant – had been satisfied to the core. (p 414 b, c & e)

[Application allowed.]

Case(s) referred to:

Aviagents v. Balstravest Investments Ltd [1966] 1 WLR 150 ***(refd)***
Berad v. Berad [1919] AC 956 ***(refd)***
Birkett v. James [1977] 2 All ER 801 ***(foll)***
Biss v. Lambeth, Southwark and Lewisham Health Authority [1978] 2 All ER 125 ***(refd)***
Bursey v. Bursey [1960] 58 DLR (2d) 451 ***(refd)***
Camosun Commercial Co v. Gareston & Bolster [1914] 7 WWR 219 ***(refd)***
Chris Smaller [1989] AC 1197 ***(refd)***
Costellow v. Somerset County Council [1993] 1 All ER 952 ***(refd)***
Datuk Samy Vellu v. Karpal Singh [1989] 3 MLJ 493 ***(refd)***
Peacock v. Bell & Kendall [1667] 1 Wms Saund 73 ***(refd)***
R Rajasingam v. Balwant Singh Purba [1996] 3 CLJ 222 CA ***(refd)***
Re Nichia Estate and City of Toronto [1968] 66 DLR (2d) 200 ***(refd)***
Toh Hock Thye & Ors v. Toh Chwee Biow [1982] 1 MLJ 152 ***(refd)***
Wee Siew Noi v. Lee Mun Tuck [1993] 2 SLR 232 ***(foll)***
Westminster City Council v. Clifford Culpin & Partners [1987] 137 NLJ 736 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 14 r. 1, O. 18 r. 19(1)(d), O. 24 r. 16(1), O. 25 r. 1(4), (5), O. 28 r. 10(1), O. 34 r. 7, O. 92 r. 4

For the plaintiff - Dhyana Shila; M/s Soo Thien Ming & Nashrah
For the 5th defendant - CH Chang; M/s Christina Chia Ng & Partners

Reported by Suresh Nathan

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JUDGMENT

Abdul Malik Ishak J:

Introduction

This was a dispute between the plaintiff and the fifth defendant and the b judgment centred on them. The *status quo* of the rest of the defendants may be stated as follows. The first defendant has since been wound up while the second defendant has passed away. The third and the fourth defendants have been made bankrupts.

c This was the fifth defendant's application in encl. 31 to, *inter alia*, strike out the plaintiff's claim on the grounds that it was an abuse of the process of the court and for want of prosecution. It was an application fashioned under O. 18 r. 19(1)(d) of the Rules of the High Court 1980 ("RHC") read with O. 92 r. 4 of the RHC.

d **Chronology Of Events**

It would be ideal to set them out in the following manner:

(1) the plaintiff's action was filed on or around 7 July 1987 by way of a writ of summons dated 7 July 1987 against all the defendants;

e (2) the plaintiff applied for an order to enter final judgments under O. 14 r. 1 of the RHC against all the defendants on 2 March 1988 and was granted an order in terms by the senior assistant registrar on 12 May 1988;

(3) the defendants filed a notice of appeal to the judge in chambers against f the order on 16 May 1988 and on 20 April 1989 and the defendants' appeal was allowed with costs;

(4) the plaintiff then proceeded to file the summons for directions on 14 May 1991 and the senior assistant registrar heard that summons for directions on 12 June 1991;

g (5) pursuant to the summons for directions, the plaintiff was ordered, *inter alia*, to take all the necessary actions for the setting down of the action for trial within 90 days from the date of the order;

(6) but, alas, no action was taken by the plaintiff after the court order h (referring to the summons for directions order);

(7) sometime on or around 14 June 2001 – that was more than ten (10) years from the date of the court order, the plaintiff's solicitors served a copy of the notice of intention to proceed with the action dated 14 June 2001 to the fifth defendant's solicitors;

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(8) subsequently, on or around 22 February 2002, the fifth defendant's solicitors received the sealed copy of the notice to attend the pre-trial conference dated 30 August 2001 wherein the date for the pre-trial conference was fixed for the month of March – to be precise it was on 21 March 2002;

(9) during the pre-trial conference on 21 March 2002, further directions were given by the relevant judge to the solicitors for both parties; and

(10) on 10 June 2002, the fifth defendant filed the application in encl. 31 to strike out and/or dismiss the plaintiff's action for want of prosecution.

The Undisputed Facts

It may be stated as follows:

(a) that the summons for directions order was handed down by the court on 12 June 1991;

(b) that the plaintiff did not take any action in accordance with that court order and the plaintiff's solicitors served a copy of the notice of intention to proceed with the action dated 14 June 2001 to the fifth defendant's solicitors;

(c) that the delay on the part of the plaintiff in taking the necessary action to set down the matter for trial exceeded ten (10) long years – calculated from 12 June 1991 to 14 June 2001, precisely put it would be ten (10) years and two (2) days;

(d) that the plaintiff has, even till today, failed to provide any reasons or grounds or explained that delay; and

(e) that the fifth defendant remained as the sole defendant left in the suit.

The Law

A good starting point to begin would be by referring to the speech of Sir Thomas Bingham MR in the case of *Costellow v. Somerset County Council* [1993] 1 All ER 952 at p. 959. There his Lordship said:

> ... the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious despatch of litigation, must be observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met. This principle is reflected in a series of rules giving the court a discretion to dismiss on failure to comply with a time limit … This principle is also reflected in the courts' inherent jurisdiction to dismiss for want of prosecution.

Now, at the local scene, the rules of court are embodied in our RHC. For instance, O. 19 r. 1 of the RHC relates to default in service of the statement of claim. Order 24 r. 16(1) of the RHC refers to the failure to comply with the requirements for discovery. Order 25 r. 1(4) and (5) of the RHC is in relation to the failure to take out the summons for directions. Order 28 r. 10(1) of the RHC speaks of the failure to prosecute the matter begun by originating summons with expeditious despatch. While O. 34 r. 7 of the RHC talks of the failure on the part of any party to comply with the judge's direction and what the judge should do if that happens.

But over the years, the courts have been very magnanimous. The plaintiff will not be denied the opportunity to have his claim adjudicated on its merits simply because of procedural default. There have been occasions where the courts have held that no action ought to be dismissed unless the defendant could show that the plaintiff's default had caused him prejudice or a real risk of prejudice where no award of costs could possibly compensate. Indeed in *Costellow*'s case, the court held that in the absence of special circumstances the court ought not to exercise its inherent jurisdiction to dismiss the plaintiff's action for want of prosecution unless the delay complained of after the issue of the proceedings had caused a real risk of prejudice to the defendant. The examples of special circumstances would include, *inter alia*, procedural abuse, questionable and undesirable tactics, contumelious and intentional default, repeated default or persistent default after a peremptory order, and that inordinate delay is inexcusable. The list is never ending. It will grow endlessly. It goes without saying that the longer the delay the greater would be the likelihood of serious prejudice to the defendant at the trial. What is inordinate delay must depend on the facts of each particular case. These would vary infinitely from case to case, from time to time. But it should not be too difficult to recognise and detect an inordinate delay when it does happen. It is difficult to lay down the yardstick. How many years delay would constitute inordinate delay? Until and after a credible excuse is made out by the plaintiff, the natural inference would be that the delay is inexcusable. The courts are certainly conferred with a wide discretion to decide whether to strike out an action.

As envisaged in O. 92 r. 4 of the RHC "the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court" are wide and all encompassing. All the High Courts of Malaysia just like the High Courts of Justice in England exercise a jurisdiction which we now call the inherent jurisdiction. According to the case of *Aviagents v. Balstravest Investments Ltd* [1966] 1 WLR 150, [1966] 1 All ER 450, CA, even the Court of Appeal exercises its inherent jurisdiction. It is pertinent to point out that the English doctrine of the inherent jurisdiction of the court is reflected in almost all other common law jurisdictions although it

is not extensively used in the United Sates of America. It would certainly be difficult to set out the list of the inherent powers of the court. Apparently just like the inherent jurisdiction of the court, the inherent powers of the court may be invoked in an inexhaustible variety of circumstances and it may be exercised in varied and different ways. One is compelled to ask questions in regard to the scope of the inherent powers of the court. Questions like the following would appear in the forefront:

(1) what is its nature?;

(2) what is its juridical basis?;

(3) what are its limits?;

(4) what are its capacity to diversify?; and

(5) what are its claim to viability?

Phrases like "to prevent injustice" or "to prevent an abuse of the process of the court" are certainly too vague to be defined. In broad terms, the general jurisdiction of the High Courts in Malaysia are unrestricted and unlimited in all matters pertaining to substantive law be it civil or criminal provided those powers are not taken away in unequivocal terms by statutory enactments. Cases like *Peacock v. Bell & Kendall* [1667] 1 Wms. Saund 73; *Berad v. Berad* [1919] AC 956, PC; and *Re Nichia Estate and City of Toronto* [1968] 66 DLR (2d) 200 cited in [1969] ASCL 713 should be referred to. It must be emphasised that the High Courts of Malaysia are not subject to supervisory control by any other court except by due process of appeal. So it can be surmised that the High Courts of Malaysia exercise the full plenitude of judicial powers in all matters concerning the general administration of justice. It is indeed a wide judicial power (*Bursey v. Bursey* [1960] 58 DLR (2d) 451; and *Camosun Commercial Co. v. Gareston & Bolster* [1914] 7 WWR 219). In Malaysia, the inherent powers of the High Courts have since been documented in the RHC whereas the source of the inherent jurisdiction of the High Courts is derived from its very nature as a court of law.

In legalistic language, in a striking out action for want of prosecution, Lord Diplock aptly said in *Birkett v. James* [1977] 2 All ER 801 at p. 805:

> ... I shall refer to as *Allen v. McAlpine* [1968] 1 All ER 543, the Court of Appeal laid down the principles on which the jurisdiction has been exercised ever since. Those principles are set out, in my view accurately, in the note to RSC Order 25, rule 1, of the current White Book. The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, eg, disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2)

> (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party ...

Ten years down the road, *Birkett v. James (supra)* was heavily criticised by Kerr LJ in *Westminster City Council v. Clifford Culpin & Partners* [1987] 137 NLJ 736 at pp. 737 to 738. This was what Kerr LJ said:

> There are constant complaints about delays in our legal processes and suggestions for reforms, such as the current Civil Justice Review by the Lord Chancellor's Department. But no changes in the organisation or administration of the courts would make any material difference to cases such as the present. By far the major part of all delays stems solely from the way in which litigation is conducted. In this connection our law needs to be changed, both in substance and procedurally. The principles laid down in *Birkett v. James* [1978] AC 297; [1977] 2 All ER 801 are unsatisfactory and inadequate. They are far too lenient to deal effectively with excessive delays. Moreover they then breed excessive further delays and costs in their application. The long line of decisions concerned with striking out applications, both reported and unreported, demonstrate that the regime of *Birkett v. James* should be replaced by a system of rules which are much stricter, more effective and simple to apply. And it is highly questionable whether plaintiffs should be allowed the benefit of the full periods of limitation, with virtual impunity, where the facts are known and there is no obstacle to the speedy institution and prosecution of claims. The present system provides insufficient sanctions for those responsible for the dilatory and inefficient conduct of litigation, and it is frequently unfair to litigants.

Be that as it may, the defendant in an application to strike out the plaintiff's action may establish that as a result of the plaintiff's delay there was a risk that:

(i) there may not be a fair trial of the action; or

(ii) there may be some other prejudice to the defendant other than the mere inability on the party of the defendant to have a fair trial of the action.

A long delay like the present case would have impaired the memory of the witnesses and there would therefore be a substantial risk that it was not possible for the defendant to have a fair trial of the action. Some other factors to reckon would be this. That key witnesses may have died or if alive could not be traced.

Now, once the defendant has succeeded at establishing inordinate and inexcusable delay on the part of the plaintiff the next step for the defendant to prove would be that the delay has caused or is likely to cause him serious prejudice. As to what would amount to prejudice, reference should be made to the speech of Lord Griffiths in *Chris Smaller* [1989] AC 1197 at p. 1209; [1989] 1 All ER 897 at p. 904; [1989] 2 WLR 578 at p. 587. There his Lordship said:

> … prejudice may be of varying kinds and is not confined to prejudice affecting the actual conduct of the trial. It would be foolish to attempt to define or categorise the type of prejudice justifying striking out an action ...

Prejudice may occur in the following situations:

(1) the anxiety suffered by the nurses was said to be sufficient prejudice to justify striking out the plaintiff's action (*Biss v. Lambeth, Southwark and Lewisham Health Authority* [1978] 2 All ER 125; [1978] 1 WLR 382, a decision of the Court of Appeal);

(2) the delay besieging the professional man was held to be prejudicial to him (*Chris Smaller*'s case *(supra)*);

(3) the defendant "quite a well-known personality in the profession" and also a Member of Parliament was said to have been prejudiced by the plaintiff's delay of eight years in prosecuting the libel action against the defendant (*Samy Vellu, Datuk v. Karpal Singh* [1989] 3 MLJ 493); and

(4) financial loss in running the defendant's business may be considered as part and parcel of prejudice (*Chris Smaller*'s case *(supra)*).

That would constitute my minor discourse on the law. As I see it, once the pre-conditions of inordinate delay and prejudice to the defendant were established, and this has been done successfully in this case, I have no choice but to exercise my discretion to dismiss the present action.

The Delay Exceeding Ten (10) Years And The Failure On The Part Of The Plaintiff To Explain That Delay Which Has Since Become Inordinate And Inexcusable

Factually speaking, for want of repetition, it would be germane to consider these factors:

(1) the plaintiff did not take any action nor take the necessary steps in accordance with the summons for directions order dated 12 June 1991 to set down this matter for trial;

(2) the plaintiff took steps to proceed with the action on or around 14 June 2001 and this was after more than ten (10) years from the date of the court order when the plaintiff's solicitors served a copy of the notice of intention to proceed with the action dated 14 June 2001 to the fifth defendant's solicitors; and

(3) the long delay of ten (10) years and two (2) days was certainly prejudicial to the fifth defendant.

The failure on the part of the plaintiff to furnish the court with any satisfactory explanation or provide any reasonable excuse for the delay aggravated the matter further. In my judgment, the plaintiff was guilty of inordinate and inexcusable delay (*Toh Hock Thye & Ors v. Toh Chwee Biow* [1982] 1 MLJ 152, FC; and *R Rajasingam v. Balwant Singh Purba* [1996] 3 CLJ 222, CA).

Lest I be accused of an oversight, I must proceed further. The plaintiff had attempted to justify that they need not explain the delay of ten (10) years and two (2) days by arguing that:

(i) their delay for ten (10) years and two (2) days ought not to be considered by this court because the defendant by conduct had induced the plaintiff to reasonably believe that the defendant intended to exercise his right to trial; and

(ii) that the defendant had waived or acquiesced in the delay.

The plaintiff also sought to itemise the conduct of the defendant which was said to have been instrumental in inducing the plaintiff to reasonably believe that the defendant intended to exercise its right to trial and, consequently, had waived or acquiesced in the plaintiff's delay. That conduct may be summarised as follows:

(a) That the fifth defendant did not apply to strike out the plaintiff's claim immediately after the plaintiff had filed and served the notice of intention to proceed and the notice to attend the pre-trial case management. With respect, this was an insignificant factor. On the strength of the case of *R Rajasingam v. Balwant Singh Purba (supra)*, the fifth defendant was entitled to apply, at any stage, to strike out the plaintiff's action for want of prosecution and that the delay by the fifth defendant should not be held against him.

(b) The fifth defendant's solicitors had attended the case management on 21 March 2002 and did not inform the court that no instructions were received from the fifth defendant. This was also an insignificant factor. At any rate, the fifth defendant had explained it in this way:

(i) that only shortly before the case management on 21 March 2002, the fifth defendant's solicitors was able to contact the fifth defendant after a lapse of more than ten (10) years;

(ii) that the fifth defendant needed to seek further advice and to deliberate over the matter;

(iii) that the fifth defendant had to peruse through his records for any available material or information pertaining to the case because the fifth defendant was unable to recall matters which happened more than ten (10) years ago;

(iv) that the fifth defendant was unable to give specific instructions to his solicitors whether to strike out the plaintiff's action at that material time and all the fifth defendant was able to do was to instruct his solicitors to attend the case management; and

(v) that it was only after the case management and after obtaining further advice and after due deliberation on the matter that the fifth defendant finally decided to instruct his solicitors to file the application to strike out as seen in encl. 31.

(c) The mere "inaction" on the part of the fifth defendant. Likewise, this was an insignificant factor. On the authority of the case of *Wee Siew Noi v. Lee Mun Tuck (the administrator of the estate of Lee Wai Leng, deceased)* [1993] 2 SLR 232, Court of Appeal of Singapore, the mere "inaction" on the part of the fifth defendant cannot in any way amount to an inducement and/or waiver and/or acquiescence.

(d) The fifth defendant had contributed to the plaintiff's delay by:

(i) allowing the matter to remain in the court registry and did not set it down for trial;

(ii) failing to apply to dismiss the action earlier; and

(iii) failing to file the statement of defence.

Now, all these points may be taken cumulatively and when so taken I must say that the fifth defendant was entitled to apply to strike out the plaintiff's action for want of prosecution at any stage of the proceedings. Furthermore, any delay should not be held against the fifth defendant (*R Rajasingam v. Balwant Singh Purba (supra)*). At any rate, the mere fact that the fifth defendant had not filed his defence diligently did not, by itself, provide a ground

for refusing to grant the fifth defendant's application to dismiss the action *(Wee Siew Noi v. Lee Mun Tuck (the administrator of the estate of Lee Wai Leng, deceased) (supra))*. Although the fifth defendant could take the initiative to set down the action for trial, it was still open to the fifth defendant to apply to strike out the plaintiff's claim *(R Rajasingam v. Balwant Singh Purba (supra))*.

In so far as encl. 31 was concerned, there was evidence emanating from the fifth defendant to the effect that after a lapse of so many years, all the records which would have been material to the present action which were previously in the possession of the fifth defendant have gone missing and have been destroyed. The fifth defendant too deposed that he would not be able to recall and give evidence at the trial in regard to all the matters that had happened more than ten (10) years ago. The other witnesses which the fifth defendant intended to call would also suffer from impaired memory and the lack of the relevant records. It must be recalled that there were five (5) defendants at the initial stage of the present case. It was because of the plaintiff's delay for more than ten (10) years which had resulted in the fifth defendant – in his capacity as a guarantor, to become the sole defendant to defend and bear the consequences of this case all by himself. It certainly made life difficult for the fifth defendant. It had greatly prejudiced the fifth defendant. If the plaintiff's action were to be allowed to continue, there would be a substantial risk that it would not be possible to have a fair trial for the fifth defendant and, consequently, it would cause serious prejudice to the fifth defendant. In my judgment, the fifth defendant had sufficiently proved that all the pre-conditions for striking out as alluded to in the early part of the judgment have been satisfied to the core.

Conclusion

For all these reasons, I allowed the fifth defendant's application in encl. 31 with costs. I too ordered that this file be closed forthwith.